No 65

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

OCTOBER TERM, 1892.

BARBEE T. BLACKBURN and
SADIE M. BLACKBURN,
Appellants,
vs.
CHARLES T. WOODING,
Appellee.

APPELLANTS' BRIEF.

GALUSHA PARSONS,
Solicitor for Appellants.

NEWS PUBLISHING CO., PRINTERS, TACOMA.

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APPELLANTS' BRIEF.

This action was commenced in the District Court of the erritory of Washington. Upon the admission of the State, it was transferred to the Federal Court. The first question is, whether that court had jurisdiction of the case?

The time of the commencement of the action in the territorial court nowhere appears in the record, the pleadings having been burned and copies substituted by stipulation, which do not show the date of the filing of the originals. The first paper contained in this record purports to be a second amended complaint, and states upon its face that it was filed to supply the pleadings filed in the District Court on the 31st day of August, 1889, and burned at Vancouver. This is followed by a motion to make the complaint more definite, which purports to have been served October 31st, 1889. This motion does not seem to have been disposed of before the admission of the State, November 11th, 1889. After this date the following proceedings were had in the State Superior Court:

April 30th, 1890, the parties stipulated for thirty days to answer. Record pa. 18.

May 26th, defendant filed a motion to require plaintiffs to make the complaint more definite. Id. 18. The record does not show any ruling upon this motion, but a further or second amended complaint was filed, to which a like motion was filed and sustained. Id. 19–20.

Mr. Irwin, defendant's then attorney in the case, having been elected Judge of the Superior Court, to which the cause was transferred upon the admission of the State, at the request of plaintiffs' attorney, made an order transferring the cause to the United States Circuit Court. After it was transferred, plaintiffs, in compliance with the order of the Superior Court, filed an amended or substituted bill, being the bill now here. The jurisdictional allegations are that plaintiffs were at the time of the commencement of the action and at the time of filing this bill, citizens of the State of California; that respondent at the time of the commencement of the action was a resident in the

Territory of Washington, and at the time of filing this substituted bill, a citizen of the State of Washington. Id. 22.

February 5th, 1891, defendant filed a motion to strike the bill from the files. Id. 29. This motion was denied.

April 2nd, 1891, defendant demurred. Id. 31. The demurrer was overruled.

August 17th, 1891, defendant filed his answer to the substituted bill.

September 8th, 1891, plaintiffs filed the usual replication and the evidence now here was afterwards taken.

March 30th, 1892, the court filed its opinion in the case and the plaintiffs filed a motion to remand. Id. 213 to 218.

May 5th, 1892, plaintiffs filed a motion for a rehearing. Id. 219.

May 11th, 1892, the petition was heard, denied and the decree from which this appeal was brought was entered. Id. 224 to 226.

Both the orders denying the motion to remand and the petition for a rehearing were excepted to.

STATEMENT OF THE CASE UPON ITS MERITS.

The plaintiff, B. T. Blackburn, was the owner of a fractional section of land in Chehalis County, Washington, containing five hundred and seventy-four and forty-five one hundredths (574.45) acres. The Circuit Judge held that the land was the community property of said Blackburn and a former wife, and that their children, her heirs at law, were the present owners of an undivided one-half interest in it.

Certificates, September 14th and 18th, 1882.
Death of Mrs. Blackburn, April 12th, 1884.
Patents issued June 20th, 1884.

Mr. Blackburn was married to his present wife January 30th, 1887. During the lifetime of his former wife and at the time of his marriage to his present wife, he lived in the State of Kansas.

The history of the case is as follows:

1.

"Montesano, W. T., February 15th, 1889.
B. T. Blackburn, Fall Brook, California: Wire us forty day refusal on section six, township seventeen, range nine. C. E. Jameson & Co."

2.

"Fall Brook, California.
C. E. Jameson, Montesano, Washington: Six thousand buys section six. B. T. Blackburn."

3.

"Montesano, W. T., February 18th, 1889.
B. T. Blackburn, Fall Brook, California: Have sold six at six thousand. Make warranty deed to Charles T. Wooding and send to Aberdeen bank. Money is deposited there. C. E. Jameson & Co."

4.

"Fall Brook, California, February 21st, 1889.
C. E. Jameson, Dear Sir: Your dispatch received and contents carefully noted. I have not received my patent, only have the receipts. You say send deed. You fill out a deed and send it with draft for six thousand dollars to West Fall Brook Banking Company, with instructions to deliver draft to me on receipt of deed

delivered to them properly signed and acknowledged.

Yours truly, B. T. BLACKBURN."

5.

"Montesano, March 4th, 1889.

B. T. Blackburn, Fall Brook, California: Have been away. Draft and deed leave to-day.

C. E. JAMESON & Co."

Receiving no answer to the above letter and desiring to sell the property, February 27th, Mr. Blackburn employed one J. W. Cheatham to come to Washington to look after the property, and Mrs. Blackburn gave him her power of attorney to sell and convey her supposed interest, assuming that as between her husband and herself it was community property, and that as the patent was obtained after the death of his former wife, that her heirs—their children—had no interest in it. Mr. Blackburn at the same time, executed and delivered to Mr. Cheatham his power of attorney to one Westfall, authorizing him to sell and convey his interest. This power of attorney was delivered to Mr. Cheatham at Fall Brook, with directions to deliver it to Mr. Westfall upon his arrival at Montesano. He arrived there March 10th, where he saw Mr. Jameson, submitted the two powers of attorney to him, by whom they were submitted to Mr. Irwin and then recorded at the suggestion of Mr. Jameson. I think the fair result of their first interview was that the talked of sale by B. T. Blackburn to Jameson evidenced by the dispatches that passed between them, and the letter of Mr. Blackburn, was at an end. Jameson expressed dissatisfaction that Blackburn should try to get out of what he called "his deal." Cheatham had learned, upon inquiry, that the property was worth not less than forty dollars ($40.00) an acre. Jameson insisted

that he ought to have Mr. Blackburn's interest at the rate of $6,000.00, and upon Cheatham's asking him what that interest was, he told him that it was one-half.

They then agreed upon a trade upon that basis. Blackburn's interest for $3,000.00 and Mrs. Blackburn's at $40.00 an acre, being in all $14,489. At Jameson's request, they all went to Irwin's office, where he told Mr. Irwin to make two deeds, one for $3,000.00 and the other for $11,489, at the time figuring the amount and giving the slip upon which it was done to Mr. Irwin as his guide. He directed the deeds to be made to this respondent. In the afternoon Mr. Thomas came up from Aberdeen. He was met at the boat by Mr. Jameson, they came together to Mr. Irwin's office, where Cheatham and Westfall then were, Mr. Thomas saying as he came in, "I am in a hurry, how much money do you want and how do you want it paid?" Jameson handed him the paper upon which the figuring was done, at the same time telling him that the amount was $14,489.00; to which Thomas answered: "Well, how do you want it paid?" It was then agreed that one draft should be made for $3,000.00 payable to Cheatham, one for $489.00 payable to Westfall and one for $11,000 00 payable to B. T. Blackburn. Without going through all of the details, both Cheatham and Westfall swear that it was one trade, and that they would not have entered into it upon any other basis. Thomas and Jameson swear that they believe they so understood it. Judge Irwin swears that he was of the same opinion. Mr. Westfall then signed the deed which had been prepared for him to sign as Blackburn's attorney, which Mr. Irwin took and passed through the door then standing open between his office and the adjoining room, a bank, and presented it to the cashier, Mr. Gilkey, and asked him to sign it as a

subscribing witness. Jameson and Thomas both went into the bank with him, leaving Cheatham and Westfall sitting at the table. Mr. Irwin then gave the deed to Thomas, who handed it to Jameson with directions to take it to the auditor's office for record, which he immediately did, without any other delivery than is here stated, and without the knowledge of either Cheatham or Westfall that it had been delivered or that it had been deposited for record. Mr. Cheatham then stepped through the door into the bank where the arrangement for paying the $3,000.00 was made, and which he then received, and immediately stepped through the door into Mr. Irwin's office for the purpose of executing a deed for the supposed interest of Mrs. Blackburn, leaving Mr. Thomas still in the bank. Jameson in the meantime had gone to the recorder's office near by and left the deed for record. Mr. Irwin was then in his office; Mr. Cheatham told him that he was ready to execute the other deed and asked him to take his acknowledgment, which he declined to do unless he was identified. The time was occupied in this way until Jameson returned from the auditor's office, joining Thomas in front of Mr. Irwin's office, where Cheatham and Westfall saw them conversing together with some paper in their hands, which they supposed to be the deed that Irwin had taken into the bank. They then came into Irwin's office, where Thomas, stepping up behind him (Cheatham), said: 'We don't want your deed, you can go to hell with it, Mrs. Blackburn has no interest in this land; this is my friend Mr. Jameson; whenever Blackburn wants to catch a couple of suckers, he will have to get a smarter man than you. Good day."

There is practically no attempt upon the part of Jameson, Thomas or Irwin to deny any of these facts. They are stated with different degrees of coloring; but

there is no substantial difference between them. Mr. Irwin says that he had been previously consulted, a long time before, by Jameson as to what interest Blackburn had in the land, and had told him that he owned but one-half; that it was community property, and the other half belonged to his children, as the heirs at law of his first wife.

The land was at that time worth $25,000.00 or $30,000.00. It has varied in value since the commencement of this action, being at its highest worth over $100,000.00. Probably at the time the evidence was taken, it was fairly worth $25,000.00. Mr. Thomas puts it as low as $6,000, and says it was never worth any more; but none of the disinterested witnesses put it at less than $40,000.00 or $50,000.00 and upwards of $100,000.00.

Cheatham and Westfall immediately inquired of Mr. Irwin what these proceedings meant. His answer was that "It would be foolish to spoil good paper," that Mrs. Blackburn had no interest in the land. They consulted counsel, sought Mr. Wooding in person and promptly offered to return the money and demanded a reconveyance. They told him that they were ready to convey the whole, if the whole amount of money was paid; he refused their offers. Upon their return to California, Mr. Blackburn came in person and sought Mr. Wooding, but was unable to see him. The money was tendered to Mr. Irwin, his attorney, but was refused and this action was commenced. The bill takes no notice of the telegraphic communications passing between Jameson and Blackburn, it rests upon what took place at Montesano, it charges that the deed was obtained by fraud, that it in fact had never been delivered, and prays a decree that it be cancelled of record. It alleges that Jameson and Thomas were the agents of the respondent in

what was done. The answer denies that Jameson was his agent, and alleges that he was the agent of complainant, B. T. Blackburn; that the purchase was made of him as such agent. The evidence is somewhat voluminous, but is printed in full. The District Judge, sitting at the circuit, rather reverses the charge of fraud and finds that the complainants were attempting to practice a fraud upon the respondent; that therefore they could have no standing in a court of equity, and although the deed is of the entire property, with covenants of warranty, that it should stand and respondent be allowed to retain the title which he had obtained in the way above stated.

Opinion filed March 30th, 1892.

Motion to remand filed upon the same day.

Petition for rehearing, May 5th. Overruled May 11th.

The decree appealed from was entered immediately upon the overruling of this petition.

ASSIGNMENT OF ERRORS.

First. The court erred in refusing to remand the cause and in retaining jurisdiction to render a decree upon the merits.

Second. The court erred in finding upon the evidence that there was not sufficient fraud in obtaining the deed to entitle the complainants to the relief demanded.

Third. It erred in finding that there was evidence sufficient to show that there was any contract for the sale of the land between the complainant Barbee T. Blackburn and the respondent, which could be enforced either at law or in equity.

Fourth. It erred in dismissing the bill upon its merits.

ARGUMENT.

I.

HAD THE CIRCUIT COURT JURISDICTION?

This involves, first, the proper construction of Section 23 of the Act of February 22nd, 1889, for the admission of Washington and other territories into the Union, second, whether, if the case was one which could have been at the proper time transferred to that court, it could be so transferred after the proceedings above enumerated were had in the State court? Manifestly, the first of these questions cannot, perhaps neither can, be satisfactorily answered merely by a reference to the general principles and settled rules as to the jurisdiction of the federal courts. But it is equally clear, that they cannot be answered without some regard to those principles. The section of the act above referred to, so far as material to this question, is in substance—That all cases pending in the district courts of any of the territories named, at the time of its admission into the Union as a state, and arising within the limits of such state whereof the circuit or district courts established by that act might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases, the circuit and district courts shall be respectively the successors of the district courts of the territory. That as to all other cases, the courts which should be established by any of the new states, should be the successors of the teraitorial courts. It is provided generally that the files and records should be transferred to the proper courts, with a special proviso as to the cases that come within the jurisdiction of the

federal courts, that in civil actions no transfer of the records and files should be made to the circuit or district courts of the United States, except upon the written request of one of the parties, filed in the proper court; that in the absence of such request, such cases should be proceeded with in the proper state courts.

I suppose the following will be accepted as rules that are too well settled to properly admit of the citation of authorities:

1. The jurisdiction of a federal court must always affirmatively appear, the presumption is against it.

2. The consent of parties will not give jurisdiction where it does not appear of record, nor will silence or affirmative acts of waiver have that effect.

3. The court will, of its own motion, at any time dismiss the cause upon the discovery that there is an absence of the requisite jurisdictional averments.

4. Where jurisdiction depends only upon citizenship, it must affirmatively appear that the requisite citizenship existed at the time of the commencement of the action. As a sort of counterpart to this, if it does appear and the party goes to trial without pleading to the jurisdiction of the court, although it should subsequently appear that the averment was in fact false, the jurisdiction will still be retained.

5. That one of the parties residing in a territory is not, *therefore*, a citizen of another state, he may or he may not be, according to his actual citizenship.

At the time of the transfer of this cause, there were no reported decisions giving construction to the above act. In Washington at least, I believe it had been generally supposed by the profession that a resident in the Territory of Washington would, by the admission of the state become a citizen of that state, within the meaning of the act.

Since that time the following cases have been decided in the order in which they are here cited:

Dorne vs. Richmond Silver Mining Company, 43 F. R. 690; Edgerton, J. This action was commenced in the territorial court, where judgment was rendered against the defendant, from which he appealed. It was pending in the Supreme Court at the time of the admission of the state. Appellant moved in the state supreme court to transfer it to the United States court; the motion was fully heard and the decision reported, 44 N. W. 1021. The cause was transferred and plaintiff moved to remand to the state court. The cases of Express Company vs. Kountze, 8 Wall 342, and Baker vs. Morton, 12 Id. 151 were cited and held decisive of the question. The supreme court of the United States in deciding the first of these cases, there being no special provision in the act of congress for the admission of Nebraska, held that the question must be governed by section 8 of the act of congress of February 22nd, 1847, 5 St. at Large, page 130.

That act as originally passed by its terms related only to the Territory of Florida, which had been admitted March 3rd 1845, but without any provision for the disposition of the business then pending in its courts. No state courts were organized for a considerable period after the admission of the territories, and the profession had continued to bring actions in the previously existing territorial courts.

The case of Benner vs. Porter there cited, 9 How. 235, was a suit in admiralty, brought during this interim. It was brought in 1846. It is manifest that such a case could have no application to the question here, if indeed it could have any general application. The provision relating to business in the courts of Florida, above referred to, was afterwards extended to all new states, 5 St. at Large, page 212, sec. 2.

Express Company vs. Kountze, was decided under this general law. It provided that *ipso facto* upon the admission of a territory as a state, that all cases of a federal character and jurisdiction *then* pending in the territorial courts "are *hereby* transferred to the district court of the United States." I think it is clear that there was under this act, no question of citizenship at the time the action was commenced. Citizenship, within its meaning, began upon the admission of the state; in a certain sense, it was created by the act of admission, the case then, *thereby*, became one of federal jurisdiction. To show that the present case would have been one of federal cognizance under the general law, if the enabling act had contained no provision upon the subject, would be simply to prove that the enabling act, if it has made any change in the law, was surplussage. This class of cases, by this construction, would stand just where they would if the enabling act had been silent upon the subject. It seems to me too manifest to admit of argument that the distinction between these acts of congress is, that the general law made the jurisdiction of the newly created federal court depend upon the condition of things—the citizenship of the parties—at the time of the admission; the other, the enabling act, for such is its express language—at the time of the commencement of such cases—placed it upon the existence of things when the suit was brought. I have heard it suggested that this would practically defeat the attaching of federal jurisdiction on any case, but this clearly is not so, as the parties might still be citizens of different states, when either would have the right to elect whether he would remain in the territorial court, or take the case into any federal court where the defendant could be found. It would be a controversy between citizens of different states.

The case of Baker vs. Morton is also under the general law above referred to. In neither the state court or the federal court was there an allusion to the fact that there either was or might be a distinction between the acts referred to. In both, it was assumed that the construction of the general act was decisive of the construction to be given to the enabling act.

Herman vs. McKinney, 43 F. R. 689, Judges Shiras and Edgerton. The court did not go into any discussion or consideration of the question, but accepted the construction given in the preceding case. These are the only cases which I have been able to find which have given this construction to this act. Those giving the contrary construction are the following:

Stra-berger vs. Beecher, 44 F. R. 209, Knowles, J.
Nickerson vs. Crook, 45 Id., 658, Hanford, J.
Johnson vs. Bunker Hill Co., 46 Id., 417, Sawyer, J.
Sargent vs. Kindred, 49 Id., 484, Thomas, J.

The latter case also holds that were a party has submitted to the jurisdiction of the court after the right of transfer attached, the right of transfer is waived.

In the case first cited, the case of Ames vs. R. R. Company, 4 Dillon, 252, was cited in support of the construction then given this act. This case arose under the act for the admission of Colorado, 19 St. at Large, 61, it was before the court upon a motion to docket. It is fairly inferable that the defendant, within the construction of the federal judiciary acts as to corporations, was a citizen of Colorado. There was no allegation of the citizenship of the plaintiffs at the time when the suit was commenced in the territorial courts, but the court say in the deposition of the cause, that that was not very material.

The section of the Colorado act corresponding to the present is quoted in full, and is I think, so far as

this question is concerned, substantially the same as the Washington enabling act. Judge Dillon and Justice Miller sat at the hearing of the case. Two questions were decided: First, that the requisite citizenship existed at the time of the commencement of the action must appear in the pleadings or of record at the time of the transfer. If there is any distinction between that case and this in that respect, it is that the record in that case came a little nearer showing it than the record in this case. Second: That a party who proceeds in a cause after the right of transfer arose, has waived the right; or is concluded from afterwards electing to transfer to the federal court. The opinion was written by Judge Dillon; Justice Miller said "I concur in this opinion. In the first part of it fully; in the latter part of it on the ground that the party now seeking to docket the case in the circuit court, took active steps in the case after he had a right to have it docketed."

The case following the report of this case was between the same parties. It was remanded for want of jurisdiction.

The next following case, Gaffney vs. Gillette, was pending in the district court of Colorado at the time of its admission. It had previously been to the supreme court, where the judgment was reversed and the case remanded to the district court, after which an amended bill was filed, to which defendants demurred, at the same time filing a motion to transfer. Held that they had waived their right to a removal by their submission of the case in the supreme court.

So far as I have been able to ascertain, these are the only decisions which have been made under this act. They seem to me so clearly conclusive of the question that I do not feel at liberty to go at large into an expression of my own ideas as to what the con-

struction of the act in the absence of decisions should be. Why the motion to remand was denied does not appear in the record.

II.

THE CASE UPON ITS MERITS.

If the case shall not be remanded for want of jurisdiction, we submit:

First. That the evidence shows beyond *any apology* for argument, that from the first interview between Jameson and Cheatham to the act of procuring and putting the deed upon record, a deliberate, premeditated fraud was intended by both Jameson and Thomas.

Second. That neither Cheatham nor Westfall, as complainants' attorneys in fact, would have consented to any sale whatever but upon condition that it was one sale for one gross sum, $14,489.00, and that Jameson and Thomas, for the acts of both of whom we submit the defendant should be held responsible, knew that they would not have done it. That Mr. Irwin (now Judge Irwin), towards whom we would be most unwilling to say an unkind word also knew that they expected to receive the full sum agreed upon before either deed should be delivered, that they did not know that he had been retained by Jameson and Thomas, or that he had advised them to any course inconsistent with the carrying out in good faith of the agreement which they at least *supposed* they were making.

Third. That he, Irwin, delivered the deed to either Jameson or Thomas without the consent of either Cheatham or Westfall, that it was not in fact fully executed at any time, as Gilkey signed as a subscribing witness in the absence of Westfall and without his knowledge.

Fourth. That the receipt of the money was with a full expectation that the whole agreement would be carried out, and without a knowledge that Jameson had obtained possession of the deed and was then on his way to the auditor's office to place it of record.

Of course, all this requires a reading of all the evidence, which begins at page 55 of the printed record. Upon this evidence, we submit that complainants are entitled to the relief demanded; that as a part of that relief, they are entitled to recover as damages consequent upon the placing of this deed on record, for the depreciation of the property during the time that it has been placed beyond their power either to sell or to use it.

The opinion of the court begins at page 213; I think the following a fair statement of its points and substance:

1. That complainant, B T. Blackburn, contracted to sell to the *defendant* the land in question for $6,000.00; that the telegraphic correspondence between Jameson, under the name of C. E. Jameson & Co., and the letter of Blackburn to him, constitute a valid agreement between him and this respondent. The action proceeds upon the idea that there was no agreement except the one made at Montesano, and that in making that Jameson, as well as Thomas, was the agent of respondent. The answer denies that Jameson was his agent, and alleges that he was the agent of the complainant, B. T. Blackburn, and that the purchase was made of him as Blackburn's agent, instead of by him as respondent's agent.

2. That at the time of whatever agreement there was, if any, or whether it was made by correspondence or by parol at Montesano, complainants fraudulently concealed the fact that if either of the wives of Mr. Blackburn had any interest in the land, it was the de-

ceased wife, and that her interest had passed to her living heirs—their children—that this was a fraud upon respondent and defeated any claims that complainants might have had in a court of equity upon the familiar principle that they did not come into court with clean hands.

3. That under the law, the former Mrs. Blackburn was entitled to a community interest in the property, that to conceal this, and the fact of her death and that there were minor chlldren, was a fraud, although defendant's agents were fully informed of all these facts through other sources—which certainly must have been before Cheatham arrived at Montesano, as Mr. Irwin testifies that they consulted him about Mrs. Blackburn's interest *long* before they came to him to prepare the deeds, and Cheatham came there only the day before.

4. That any agreement by Mrs. Blackburn was void for want of consideration.

5. That by executing this deed—to the entire property with covenants of warranty—B. T. Blackburn had exhausted his power to perform his contract; that the $3,000.00 received was full payment for his *half* according to the contract price, therefore complainants were without equity and their bill should be dismissed.

6. That this deed was fully executed and that the manner in which it was obtained and placed of record would not *in view of a court of equity* impair its validity.

THE MANNER IN WHICH THE DEED WAS OBTAINED.

I cannot but feel that it is a great trespass upon your Honors' patience in this printed argument to quote very largely or to argue very fully the questions of fact in the case, as they can only be answered by

reading the evidence in full, but the argument would be no argument without incorporating by tiresome reference or *quotations* its most material parts. The thing to be proved—assuming that whatever took place at Montesano related to a sale of the whole property, was one sale for one sum, and that the idea of *two* deeds and two considerations came from Jameson, afterwards *sanctioned* by Thomas, and, impliedly at least, approved by Mr. Irwin—is that the whole was, so far as Jameson and Thomas were concerned, a part of a previously designed plan to get possession of a deed of the land, executed by Westfall in the name of Blackburn, and to file it for record and *then* to announce that their purpose was accomplished. If this is not shown by the evidence in this case, I would despair of ever being able to produce evidence sufficient to prove, to the satisfaction of a court either of law or equity, any fact by oral testimony. With the opinion of his Honor who decided this cause, before me, of course I cannot but feel that this is strong language, and perhaps rather too bold a way of putting it; but the opinion finds that the agreement was entered into by Cheatham and Westfall with the *expectation* that the arrangement, as they understood it, would be carried out and that Thomas and Jameson knew it. Rec. 214–15.

Blackburn testified: "The draft and deed never came; I then considered the negotiations had failed, and wishing to sell the land I then sent the power of attorney to G. F. Westfall," p. 57. "Jameson was not acting as my agent," p. 58.

Cheatham, whose testimony in the record follows that of Westfall, testified that upon his arrival at Montesano, he saw Mr. Jameson and told him his business, that the latter asked him what he wanted for the property, to which he answered, he could not tell

until he looked the matter up a little; to which Jameson answered, "All right, see what you think it is worth and let me know; if we cannot give you as much as you want, then we will quit." That he (Cheatham) ascertained upon inquiry at Aberdeen that the land was worth $40.00 an acre; that Mr. Jameson had contracted for the sale of it at that price; that he returned to Montesano, saw Mr. Jameson a second time, who asked him if he had come to a conclusion as to the value of the land; to which he answered: "Yes, forty dollars an acre;" to which Jameson said: "That is one way for Blackburn to get out of his bargain;" that he further said that Blackburn had agreed to sell him the land for six thousand dollars, and he thought he ought to have it for that; that he insisted that as he had been trying to make a deal with Blackburn for six thousand dollars, his interest ought to go at that rate; that he (Cheatham) asked him what interest Blackburn had under the law of that state, to which he answered "one-half." After some dickering, the trade was made for forty dollars per acre for one-half interest, and the other half at the rate of six thousand dollars, with Mr. Westfall's consent, making fourteen thousand four hundred and eighty-nine dollars ($14,489) for the land. They then went to Mr. Irwin's office, where Mr. Irwin examined their powers of attorney, compared the descriptions and pronounced everything correct. Mr. Jameson then told him (Irwin) to make out a deed for the one-half interest that he represented. "I asked them to wait until Mr. Westfall came and make a joint deed, they both told me that Mr. Westfall had already made his deed and it would be all right to make another for me; I said 'I suppose so,' I would sign a quit claim deed as long as they deemed it unnecessary to have a joint deed. Mr. Irwin then made a quit claim deed to the land for

Mrs. Blackburn to be signed by me, naming as consideration the sum of eleven thousand four hundred and eighty-nine dollars, the same to be paid according to contract. The deed was made by his directions to Charles T. Wooding. Mr. Jameson then said that he would telegraph Mr. Thomas or his party at Aberdeen and have them come up on boat in the afternoon, and they would fix it up. Mr. Irwin then asked Jameson if they were going to take it at those figures and he said, yes, they had sold a part of it and were anxious to have it. At page 76 he says:

"The deed was left at Mr. Irwin's office until afternoon and we were to meet there at that time and fix the matter up. Mr. Westfall and I went there in the afternoon at the time appointed. After Mr. Westfall had signed the deed made for him to sign Irwin picked up the deed made for me to sign saying that he did not like to take my acknowledgment as he was not personally acquainted with me. I told him that he could do so on the oath of Mr. Westfall which he said he would do, but just when he was about to swear Mr. Westfall, Mr. Thomas and Jameson came into the office. Mr. Thomas stepped up behind me, tapped me on the shoulder and said: 'We don't want your deed, you can go to hell with it. Mrs. Blackburn has no interest in this land. This is my friend Mr. Jameson, whenever Mr. Blackburn wants to catch a couple of suckers, he'll have to get a smarter man than you. Good day,' and off they went. I asked Mr. Irwin what that kind of business meant. He said they had the title and they would be foolish to pay me $11,489 for nothing as Mrs. Blackburn had no interest in the land. I said she did; if not it made no difference as they bought her interest for $11,489 and they had no right to steal the title without paying what they had

agreed to. I told Mr. Westfall we had better see a lawyer and have this thing straightened up."

At page 77, interrogatory 16, speaking of the afternoon of the same day, he says:

Mr. Thomas and myself met at Mr. Irwin's office. We were there to close up the deal on this land. Mr. Westfall and I were in Irwin's office waiting for Thomas and Jameson to come. Thomas was to come on the boat, deeds were ready to be signed when Thomas came, Jameson being already there. When Thomas came he rushed in and says, "I am in a hurry, how much money do you want and how do you want it paid." Jameson handed him a paper with the figures on it at the same stating that the amount was fourteen thousand four hundred and eighty-nine dollars. Thomas said: "Well, how do you want it paid? All in one draft or divided up?" I told him I wanted one for three thousand dollars payable to myself, and one for four hundred and eighty-nine dollars to Mr. Westfall and one for eleven thousand dollars payable to B. T. Blackburn. They then raised the objection of paying any money to me as I was a stranger. Said they would pay to Mr. Westfall and if he wanted to take the risk of letting me have it all right. I said all right, I don't care who it is made payable to so long as I can use the money in San Francisco when I get there. Mr. Westfall said he would endorse it over to me. They said they would make a draft payable to Mr. Westfall for three thousand dollars.

While they were doing this Mr. Irwin took the acknowledgement of Mr. Westfall to his deed. After Mr. Westfall signed the deed, he handed it to Mr. Irwin to sign it as Notary. Irwin then took the deed into another adjoining room used as a bank, and handed it to Mr. Thomas, who, I think, handed it to a man behind the counter in the bank. Mr. Irwin then

came back and picked up the deed made for me to sign and said that he did not like to take my acknowledgment as he was not personally acquainted with me. I told him that he could do so upon the oath of Mr. Westfall which he said he would do; but, just as he was about to swear Mr. Westfall, Thomas and Jameson cameinto the office by another door than the one through which they had passed when they left for the draft." Then follows a repetition of what he had previously said.

At page 81, interrogatory 20 he says:

He executed deed in my presence, then Irwin took it and went into an adjoining room where Thomas was; he returned in a few minutes but did not bring the deed. I saw him hand it to Thomas in the bank. Jameson then went into the bank and in a few minutes both Jameson and Thomas came in from the street.

At page 82, interrogatory 22, he says: "When Irwin took the deed and went out into the bank Mr. Thomas was in the bank, and as soon as Mr. Irwin returned to the office, Mr. Jameson left the office and went into the bank also."

To the 23 interrogatory, upon the same page, he says:

He was in Irwin's office when Thomas and Jameson came in; he asked Irwin where his deed was Irwin told him that Thomas and Jameson had it. Westfall said: "Well, we had better have the deed or the money." That was after Thomas and Jameson had gone, that he enquired of Irwin where the deed was.

At page 83, interrogatory 27, he says:

A few minutes afterwards I met them on the street. There was a conversation held between us. Westfall and I were walking down the street and met Thomas and Jameson. Thomas wanted to know if we wanted

to fix it up. I said yes. He said he would give there thousand dollars more if I would quit claim for the amount due. He then said: "You are not posted in the laws of Washington. Mrs. Blackburn has no interest under the laws of this state. Before you do any more business in this country you had better post yourself up on the laws a little further."

The foregoing embraces substantially his testimony as to what took place at Montesano. I have given his testimony before that of Mr. Westfall because Mr. Westfall seems to have acted largely by his directions, as defendant's witnesses say was the fact, and it is more explicit than that of the latter.

Mr. Westfall testifies at page 65, interrogatory 7: "Yes, there was a transaction agreed upon but never carried out between Mr. Thomas and Mr. Jameson and Mr. Cheatham and myself in regard to land of Mr. and Mrs. Blackburn in controversy here. When Cheatham and I and Jameson met at the office of Irwin, Mr. Irwin was busy making out two deeds, one a deed from Mr. Blackburn to Wooding, a warranty deed, and the other was a quit claim from Mrs. Blackburn, and Mr. Jameson figured the amount eleven thousand four hundred and eighty-nine dollars, to be put in the quit claim deed, and the warranty was three thousand dollars, and handed same to Mr. Irwin, and Mr. Irwin inserted it in each of said deeds as figured by Jameson. Both deeds were made in favor of Charles T. Wooding, as purchaser. Conveyances transferring the land were made, one by myself and one by J. W. Cheatham, under our power of attorney. The whole amount to be paid for said land was fourteen thousand four hundred and eighty-nine dollars.

Jameson asked who all the money was to be paid to. Cheatham replied that it was immaterial, that it

could be paid to Westfall. Just then Mr. Thomas came, and was in a great hurry to get back on the boat, and first says, "Well, let's rush this business through now." He says, "Who is this money to be paid to and how? It is immaterial to us; we can give you the cash or we can give you the draft." Then Mr. Irwin said, "The deed is ready for Mr. Westfall's signature," and shoved the deed over to me. The warranty deed in which the consideration was stated at three thousand dollars is the one he gave me to sign. I then signed the deed and Irwin reached for the deed and took it into the bank for Mr. Gilkey, the cashier, to witness same. I remained in Mr. Irwin's office. The next I saw of the deed Thomas and Jameson had it open on the sidewalk looking at it. In the meantime Mr. Irwin had returned to his office and was talking with Mr. Cheatham, about taking his acknowledgment; said that he could not take it unless I swore that he was the person who he claimed to be. I agreed to do that. Just as we agreed upon that, in stepped Thomas and Jameson, with the deed that I had signed, and Mr. Thomas stepped in and up behind Cheatham and tapped him on the back, and says: "This is my friend Jameson." He, Thomas, says: "You can go to hell with your deed; we have got Blackburn's deed," and says, "the next time Blackburn wants to catch suckers to send a smarter man than you," and then went out with the deed. Then Cheatham says: "How is this?" and Irwin says: "There is no use spoiling good paper." Mr. Cheatham and I went out of Irwin's office then, and as we crossed on to the next street we met Thomas, and Cheatham asked him if he wanted to settle it. Thomas says: "We will give you the three thousand dollars, the balance of three thousand dollars, and settle it that way." Thomas continued and said: "You are not posted in this country. Any lawyer can tell

you that Mrs. Blackburn has no interest in the land." The deed that I signed was taken by Irwin into bank and I never had deed in possession after I signed it. No person signed it as witness in my presence. Never had the deed in possession after I signed it and never delivered same to Thomas or authorized any one to deliver same. The only persons in the room at time I signed the deed were Thomas, Jameson, Irwin, Cheatham and myself, and there were no others there at the time, nor up to time that Thomas and Jameson returned with deed.

8. To the eighth direct interrogatory he says: The only interview or conference had between Cheatham and Jameson and Thomas was when the deed was signed by me in Irwin's office.

Jameson first asked Cheatham before Thomas came to whom the money should be paid, saying, "we don't know you." Cheatham replied that it was immaterial, "you can pay it all to Westfall." Just then Mr. Thomas came and was in a great hurry to get back on the boat, and first says: "Well, let's rush this business through now." He says: "Who is this money to be paid to and how? It is immaterial to us; we can give you the cash or we can give you a draft." We settled on a draft. He made a draft for three thousand dollars and laid it on the table. Then Mr. Irwin says: "The deed is ready for Mr. Westfall's signature," and shoved the deed over to me.

After I had signed the warranty deed and it had been taken by Irwin over to the bank, Thomas and Jameson came into Irwin's office and Thomas tapped Cheatham on the shoulder and said, pointing to Jameson: "This is my friend Jameson, you can go to hell with your deed; we have got Blackburn's deed and the next time Blackburn wants to catch suckers send a smarter man than you;" they then went out.

We then went out and met Thomas on the street. Cheatham asked him if he wanted to settle it, Thomas replied: "We will give you the six thousand dollars for a deed and settle it that way," or words to that effect. Thomas said further: "You are not posted in this country. Any lawyer can tell you that Mrs. Blackburn has no interest in the land."

When I first arrived at the office Mr. Irwin was engaged in making deeds, one a warranty to be signed by me, and one a quit-claim to be signed by Cheatham, the two deeds to convey the whole title to said lands, owned by Mr. and Mrs. Blackburn.

While Irwin was making deeds, Thomas got draft for three thousand dollars and laid it on the table. Irwin shoved deed that I was to sign over to me and I signed same, then Irwin took deed and said he would get it witnessed. After Irwin had been out with deed Thomas and Jameson came back into Irwin's office and Thomas tapped Cheatham on the shoulder and said, pointing to Jameson: "This is my friend Jameson, you can go to hell with your deed. We have got Blackburn's deed, and the next time Blackburn wants to catch suckers send a smarter man than you." Then Irwin said, after Thomas and Jameson had gone out: "There is no use spoiling good paper,"—speaking of the quit claim deed to be signed by Cheatham. We then left the office of Irwin.

11. To the eleventh direct interrogatory he said: Mr. Irwin prepared a warranty deed in which consideration was mentioned at three thousand dollars from Mr. Blackburn to Charles T. Wooding, and another deed, a quit claim, from Mrs. Blackburn to Charles T. Wooding, in which the consideration was named at eleven thousand four hundred and eighty-nine dollars. Mr. Jameson gave instructions as to how they should be drawn and the amount of consideration to be named

in each. The deed signed by me was taken by Irwin out of his office to the bank and from there it went into the hands of Thomas and Jameson, and the quit claim deed was carried away by Cheatham when we left Irwin's office.

The two deeds were made at suggestion of purchaser or his agents and consideration to be named was prepared by Jameson, who directed amount to be put in each deed.

The total amount of both considerations was to be in full for all the interest of Mr. and Mrs. Blackburn. They, Mr. Thomas and Mr. Jameson, said nothing about the consideration except that Mr. Jameson directed Mr. Irwin to name the consideration in each deed as they were stated.

Neither was to be delivered before the full amount of $14,489.00 was paid. I would not have delivered the deeds at all unless the whole amount of $14,489.00 was paid at that time. I fully understood and believed that the whole of said sum was to be then and there paid and both deeds to be delivered at once.

Irwin took it and went out of his office into the bank and the next I saw of it, it was in the hands of Thomas and Jameson.

He said that he would take it and get Mr. Gilkey to witness it. He went out of the office with it and passed out of my sight. He went into the bank.

I did not see him during the transaction of the business. I don't know whether he signed the deed as a witness or not. It was not signed in my presence nor at my request. Irwin took the deed and said he would get Gilkey to witness it.

He went into the bank so far as I know. He went out of my sight and he did not bring the deed back with him.

Cheatham and I were never left alone in the office; a regular run of conversation was kept up. One of them was with us all the time during Irwin's absence. When Irwin came back both Thomas and Jameson left the office, one being absent with Irwin and the other going out as soon as he, Irwin, returned. They returned from the outside of the office, having passed out of the bank through front door and came round the building to outside door of Irwin's office. When Jameson and Thomas came in they had the deed in their possession.

Thomas and Jameson came back together from the outside. Thomas came in first and tapped Cheatham on the back as he came in, and said: "This is my friend Jameson. You can go to hell with your deed; we have got Blackburn's deed, and the next time Blackburn wants to catch suckers, he must send a smarter man than you."

I received a draft for three thousand dollars. Business having taken a different turn than we expected, and I did not know what to do until we had taken counsel.

The testimony of Mr. Jameson begins at page 105; after producing the telegrams and letter above printed, it was in substance: That in pursuance of his telegraphic correspondence with Mr. Blackburn he sold the land to Mr. Thomas, or through him to some one unknown, over the telephone. It appears by the testimony of Mr. Thomas that he did not see Mr. Wooding, who was absent, and that he acted for him in all his business transactions. At page 108 he testified that the deed and a draft for $6,000 were sent to Mr. Blackburn. He afterwards said, on cross-examination, that all he knew about it was that Thomas telephoned him from Aberdeen that they were sent. (p. 117.) Mr. Thomas testified that no draft was ever

prepared and no deed ever drawn. (p. 190.) On the preceding page he testified that the reason why the matter was not closed up was that Mr. Wooding was in Portland, and that he wished to consult him. As to how the possession of the deed placed upon record was obtained and the means used to obtain it, while there is a great difference of language and formal statement between complainants' witnesses and respondent's, there is in the outcome no substantial difference.

Mr. Jameson testified that Cheatham told him he was going to make inquiries as to the value of the land; that he knew he went to Aberdeen for that purpose, and after his return he told him he thought it was worth forty dollars an acre; that after that Thomas came up to Aberdeen at his call. While he insists that Cheatham told him all of the time that Mr. Blackburn was ready and willing to deed his half for three thousand dollars, he testified at the same time that a much larger sum was demanded for Mrs. Blackburn's interest, and while he said he did not remember how much it was, that whatever it was was correctly insertin the deed prepared for Mr. Cheatham to execute. That deed is appended as an exhibit to the original complaint and was read in evidence. The consideration stated is eleven thousand four hundred and eighty-nine dollars, the exact amount as Cheatham and Westfall testify, that was to be paid to Mrs. Blackburn. He admits that he gave no intimation to Cheatham or Westfall that any claim would be made that she had no interest in the land, or that they did not infend to pay the amount agreed to be paid to her before the delivery of the deeds or either of them. When asked the question, *why* he did not tell Mr. Cheatham that he thought Mr. Blackburn's deed was sufficient of itself, his answer at page 113 was, "I was not attorney for Mrs.

Blackburn." Upon the next page he said he was not particular what she did so long as he got Mr. Blackburn's deed. At page 121, he admitted that the deed prepared for Mr. Cheatham to execute for Mrs. Blackburn was read in his presence, and that he thought Mr. Thomas was also present. But while it was read he said he did not know that the consideration stated was $14,489. At page 123 he said that Cheatham was after more money for Mrs. Blackburn, and that he thought he expected to receive a *certain* sum of money to execute her deed. It is true, also, he said, in the same connection, that he thought it was a put up job, *that Blackburn had found out that the land was worth more* and was trying to get out of his contract; while in the same sentence and a dozen times in other places, both he and Thomas say that Cheatham told them that Blackburn stood ready to deed. This is manifestly inconsistent with what they both admit as to the refusal of Cheatham to convey and the means practiced by them to get possession of the deed that was placed of record.

At pages 124 and 125 he testified that he knew that Cheatham expected to get more money, that he expected to get six or seven thousand dollars, and in answer to the next question said that he thought *he expected to receive the amount named in the deed;* that he expected the money to be paid them *before the trade was* accomplished. At page 126, and immediately following, he said they did not *intend* to pay Mrs. Blackburn anything. Next page, when asked why after the preparation of these deeds and during their preparation he did not tell Cheatham what they intended, he only answered, that they did not intend to pay it. After going over the matter in various forms, when asked, at page 139, this question: "*You know you obtained possession of that deed and put it on record in di-*

rect violation of what you knew he expected," he answered: "*Yes, it was not what he expected.*" He admitted that he received the deed at the bank from Thomas with directions to record it and went immediately to the auditor's office and left it for record, before returning to where Cheatham was waiting to execute the other deed. His testimony as to what took place after their return does not materially differ from that of Mr. Cheatham, it certainly does not make the matter better for their side of the controversy. At page 165 he he goes over the matter again; he there testified that Cheatham seemed to be very angry because as he said he thought he has failed to work his scheme. While all the time he testified that the latter was expressing an entire willingness on the part of Mr. Blackburn to carry out what he call their trade. At page 167 he said he knew Cheatham did not get what he expected, and when asked the question "You knew you were taking the deed and placing it of record and you knew Cheatham was not getting the money he expected," he answered, "Yes, I knew that."

Mr. Thomas' testimony begins at page 168. So far as relates to how the deed was obtained, it is that he came up from Aberdeen upon Jameson's calling him by telephone and met him near the landing of the boat. That they went together to Mr. Irwin's office. When asked the question, "In what relation did you consider you were dealing with Jameson in this matter," he answered he was a broker in securing the deed and delivering it to him ; that he knew that Mr. Blackburn had a wife living. Jameson told him. He claimed directly contrary to his repeated admissions that they were then negotiating for Blackburn's half interest, although the deed, as has been already stated, was for the entire property with covenants of warranty. At page 177 he said: "Jameson had been

doing the business for Wooding." At page 178, "That Cheatham mentioned a price for Mrs. Blackburn's interest before the money was paid or the deed delivered," he thought it was six or seven thousand dollars, but he admitted that the deed was read in his presence. He admitted at page 184, using the language attributed to him by Cheatham as to not wanting Mrs. Blackburn's deed. On the next page he said: "We did not intend to buy Mrs. Blackburn's interest." When pressed *very hard* for the reasons why he did not tell Cheatham that *before* he got possession of the deed, his answer, often repeated, was, "We did not intend to buy her interest." When the direct question, "*Why didn't you tell him so before you got possession of the Blackburn deed,*" was asked him, he repeated his answer, "We did not intend to buy her interest." When the question was pressed again in the same form, his answer was, "*I don't know why* I didn't tell him." Then this question was asked: "Is not the reason this, *that you knew he expected a much larger sum of money* for Mrs. Blackburn's deed as a part of this sale, and that you did not want him to know that *for fear you would not be able if he did to obtain Mr. Blackburn's deed,*" the answer was, "I presume not, I presume he would not." The following questions with the purpose to reach an answer, *yes or no,* were then asked:

Q. Is not that the reason why you did not tell him you were not going to pay anything to Mr. Cheatham, before you got possession of that deed?

A. It might have been.

Q. Was it not?

A. I presume he would not have delivered it.

Q. You thought at that time, did you not, that you would not be able to get Blackburn's deed from Westfall if he and Cheatham knew that you did not intend to pay anything for Mrs. Blackburn's deed?

A. I don't know. Mr. Westfall, Mr. Jameson told me, was ready to deed for Mr. Blackburn's interest for three thousand dollars.

Q. Provided you carried out your arrangement as to Mrs. Blackburn?

A. There was no provision in it.

Q He told you something about it?

A. No sir.

Q. Haven't you sworn he did?

A. They were wanting an interest.

Q. Is is not the reason why you did not tell Cheatham that you were not going to pay Mrs. Blackburn anything, because you thought if you did you would not get the Blackburn deed?

A. I cannot tell.

Q. You do not know whether that is the reason or not?

A. I cannot say we would not have got it.

Q. I ask you whether the reason why you did not tell Cheatham, while you were all there together, that you were not going to pay anything for Mrs. Blackburn's deed, was because you knew or thought that if you did, you would not get Blackburn's deed?

A. I do not know that we would not have got Blackburn's deed.

Q. Was not that the reason why you did not tell him?

By Mr. Linn: We object to the question as immaterial under the pleadings.

A. I presume the trade would not have been consummated.

Q. Why?

A. Because we would not have given the price she demanded through him for her title.

Q. And the additional reason that you knew if you did not do that the trade would fail?

A. Yes sir.

Q. For these reasons you thought it was prudent on your part or better management on your part, not to say anything about that until you first got possession of Blackburn's deed?

A. Well, I said nothing about it.

Q. I would like an answer to my question.

By Mr. Linn: We object to the question as immaterial.

A. Yes sir.

Q. After you got possession of that deed and Mr. Jameson was on his way to the Auditor's office to get it filed for record, you for the first time told Cheatham that you were not going to pay anything for Mrs. Blackburn's deed. Is that correct?

A. We told him we did not want it.

Q. Was that the first time you told him so?

A. Yes sir.

Q. Why did you tell him that after you got possession of the Blackburn deed instead of saying so to him before you got possession of it?

A. I did tell him so, I do not know particularly why.

Q. Why did you tell him after and not before? Why did you tell him after you got possession of the Blackburn deed made by Westfall and not before you got possession of it?

A. I told him, I do not know particularly why?

Q. You said that once before, I now insist upon your answering my question as to why you told him after and not before you got the deed. I ask for the reason and not the fact.

A. We had possession of the deed at that time. Is that answering your question? I presume he would not have consented to the deal.

At the bottom of page 191:

Q. You knew that Cheatham and Westfall, representing the owners, expected to get a larger amount of money by several thousand dollars than you paid, and you did not say to them that you were not going to pay it. Did you consider that a fair way to do business, an honest way to do business?

A. In view of the fact that Blackburn had offered that land for six thousand dollars, and in view of the fact of his coming up here and then taking the position he did, that he was willing to sell his half for three thousand dollars, we did not know but what he would block the wheels; Mr. Cheatham.

Q. That is all the explanation you desire to make of this transaction.

A. Yes sir.

Q. In other words, you put yourself on the moral ground that a man who would do as Blackburn had done was acting dishonestly, unfairly, and that anything you might do to get possession of his deed as against such a man was more or less justifiable?

A. Yes sir, I do.

Q, And with that view, and with that idea of the moral right of the thing, you obtained and put on record the deed made by an attorney in fact, not an attorney at law, in the absence of his principal, intending in that way to get title, notwithstanding you knew that they expected to get by six or eight or ten thousand dollars, or more, more money than you intended to pay?

A. We intended, inasmuch as Mr. Blackburn had taken the position he had in the matter, refusing to deliver the full warranty deed for six thousand dollars, that Mr. Cheatham would have it in his power to annul any contract, or the consummation of the sale, so we said nothing to him.

Q. In other words, knowing his expectations, and with the purpose after you obtained possession of the deed not to do what you knew he expected you would do, you obtained the deed and put it on record?

His answer, so far as responsive to the question, was: "We obtained the deed and put it on record, not intending to pay him what he demanded for it." He then repeats what he had said before, that they understood from Westfall that Blackburn was all the time ready to deed for $3,000.00; a statement totally inconsistent with the whole tenor of his testimony as well as with that of Mr. Jameson, as both admit that it required a good deal of management and concealment to obtain possession of the deed which they got.

At pages 194 and 195 his testimony was:

Q. Why did you use the language you did that Cheatham could go to hell with his deed?

A. Because we did not want it. *He might have taken occasion to block the entire trade if he saw fit.*

Q. You wanted to wash your hands of this matter by unloading on Jameson?

A. My position in the matter was that we could have the title for $3,000.00; Blackburn's interest. *That is what we bought and all we want.*

Q. You thought if you got that and got it safe on record you could come back and use the language you did; that Mrs. Blackburn's interest could go to hell?

By Mr. Linn: We object to the question as immaterial.

A. *Mr. Cheatham might have blocked our trade with Mr. Westfall if I had said anything to him prior to closing up with Westfall, so I said nothing until that trade was closed. We did not intend to buy her interest.*

Q. You knew that both Mr. Cheatham and Mr. Westfall thought you did intend to buy it, did you not?

A. I did not.

Q. What did you suppose the deed, by the direction of your associate in this business, Mr. Jameson, was made out for by Irwin for Mrs. Blackburn's interest?

By Mr. Linn: We object to the question, because it has not been shown that Mr. Jameson did direct that deed to be made out.

A. I did not know it.

Q. You say you thought that Cheatham might block the trade. If, as you have also said, you believed Blackburn was entirely ready to carry it out on his part, by his attorney in fact, who was present, saying he was ready, what reason had you to suppose that Cheatham would or could block it?

A. *He might have made a pecuniary consideration with the other party.*

Q. *You thought at that time if you said anything about it he would block it?*

A. Yes, sir, I thought he would do most anything from the manner he came in here. *I was very much afraid he would throw the entire thing by the board if he could.*

Q. *In other words, you thought if you told him what you intended to do that he would break up the trade?*

A. Yes, sir, if it was in his power, by offering money or anything else.

Q. And because you thought he had it in his power to break up the trade, and would do it if you told him the exact truth as to what you intended, you said nothing about it?

A. I thought he might have the power; he might influence him to go against Mr. Blackburn's wishes, so far as his interest was concerned. For that reason I did not tell him anything about it.

Q. And because you thought he had it in his power to break up the trade, and would do it if you told him

the exact truth, as to what you intended, you said nothing about it?

A. I do not know that he had it in his power; believing if he did have it, he would break up the trade for Mr. Blackburn's interest.

Q. That is not an answer to my question. And because you thought he had it in his power to break up the trade, and would do it if you told him the exact truth as to what you intended, you said nothing about it?

By Mr. Linn: We object to the question, for the reason that the question is couched in such language as tending to mislead and confuse the witness, and for the further reason, that the witness has already fully answered the question.

A. Yes sir.

At page 197 he was asked by respondent's counsel:

In your cross-examination, in reply to a question by Judge Parsons, in substance as follows: "Why did you not state to Mr. Cheatham, before the execution and delivery of the deed by Westfall, and before you had placed it of record, that you would not take the deed and pay for the same from Mrs. Blackburn," I understood you to reply that the reason was because you thought he would break up the deal. Please explain that answer.

A. I was afraid he might by a pecuniary consideration go to Mr. Westfall, not knowing the man, and get him to overthrow the original proposition *made by Blackburn to carry out his one-half, his part of the trade.* That is why I said nothing to him about it.

At page 200 he admitted that they *said nothing to Cheatham or Westfall* about Mrs. Blackburn's having no interest in the land, or that the children of the former Mrs. Blackburn had. When asked, at the bottom of page 200, why he did not, his answers were:

A. *That was their business to know that and not mine to tell them.*

Q. You have said something to the effect that your opinion of Mr. Cheatham was such that he was equal to any sort of dishonesty in this matter?

A. I have.

Q. That was your opinion?

A. Yes sir.

Q. And in part, for that reason, you concealed, by saying nothing about it, what you intended to do, from him?

A. *I did not think it my part to tell him what I intended.*

Q. In other words, apprehending that the trade would be declared off, you were afraid to be honest for fear that he would be dishonest, is that correct?

A. I not having any acquaintance with the gentleman, I did not know what position he would take. I dealt with him as a stranger. He having taken the position he did, and trying *to procure the price he did for Mrs. Blackburn's interest*, I had every reason to believe he would do anything in his power to break the trade up as between Mr. Blackburn and Mr. Wooding.

Q. In other words, you had every reason to believe, and did believe if you told him what your real intention was, he would break up the trade if it was in his power to do so?

A. *Yes sir.*

Q. That is the reason you did not tell him?

A. I did not consider it my business to tell him.

Q. Answer my question, yes or no?

A. I did not feel it my business to tell him.

Q. Answer my question, yes or no?

A. *Yes sir, it was.*

Judge Irwin's testimony begins at page 140. While it differs in some respects from that of complainants'

witnesses as to the payment of the money and the signing as a witness by Mr. Gilkey, about the preparation of the deeds his memory is very indistinct. At page 146 he testified that Cheatham and Jameson did some figuring, that after it was done, Cheatham gave it to him. Cheatham's testimony is that Jameson did the figuring and gave it to him. Next page he said the consideration which he inserted was given him by both of them. At page 149 he said that Cheatham and Westfall seemed to be very much disappointed in not getting the money that was to be paid to Mrs. Blackburn, that he believed they expected to receive over fourteen thousand dollars, that he had advised Jameson and Thomas *some* time before that if they could get Blackburn's deed, that would pass the title free from any claim of Mrs. Blackburn. That this was *a long time before;* that they told him that Mrs. Blackburn would not sign the deed. On the same page he said contrary to the above that he did *not* advise Cheatham or Westfall as to whether Mrs. Blackburn had any interest or not.

The foregoing, I think, is in substance every material fact bearing upon the manner in which the possession of the deed was obtained. What it *proves* I am content to submit without argument.

III.

If the acts of Jameson and Thomas in getting possession of the deed and putting it upon record were fraudulent and would have been sufficient to entitle complainants to the relief prayed for either because the deed had not been delivered, or because if delivered the delivery had been procured by inducing Cheatham and Westfall to believe that they would receive the full sum agreed upon, when in fact they did not intend to pay the amount, does the evidence show

anything upon the part of complainant B. T. Blackburn sufficient in a court of equity to defeat his right to what he would otherwise have been entitled to? In other words, was there a valid contract between him and respondent for the sale and conveyance of the land by him to the latter?

To which I answer: There was never any *talk* of any such contract, if there was a contract with anybody, it was with C. E. Jameson & Co., whoever that may be. Suppose that upon this same evidence Mr. Blackburn had gone into a court of equity with an action for specific performance against this respondent, setting out all the correspondence—that is the telegrams and letter that passed between him and Jameson—and suppose he had alleged the fact as to Jameson's agency to be as respondent claims it in his answer, that he was his agent, is there any doubt about it that a demurrer to such a bill would have been sustained? Plaintiff's allegation is not that Jameson was then, as to that correspondence, defendant's agent, but he was together with Thomas, who is probably the Company, indicated by the manner in which the telegrams are signed, his agent in what took place at Montesano. The correspondence, doubtless, is what brought the parties together, but it is not a contract, and beyond the fact that it brought the parties together it has nothing to do with the contract at Montesano. Even as to what took place there, it does not appear that Cheatham and Westfall knew or had any reason to believe that Jameson and Thomas were not the real parties with whom they were dealing, until Jameson directed the deeds to be made out to Mr. Wooding. Indeed, but for what took place afterwards when plaintiffs' agents saw the latter in person and made the offer to return the money and demanded a surrender of the deed, there would have

been nothing to connect him with this matter, and the action would have been against Jameson and Thomas. But the correspondence did not constitute a contract, either between him and Jameson or Jameson & Co. It did not reach a point where an offer was made by one and accepted by the other. It is elementary law, almost too elementary to excuse suggestion, that the offer and the acceptance must be of one and the same thing. That point was never reached by this correspondence. The correspondence is printed above in full. It is contained in the record at page 106. The dispatch of February 15th, was not an offer to buy, nor the solicitation of an agency, and if it had been accepted in terms, it would have created no legal obligation between the parties, and this respondent certainly would not have been one of the parties. And he says by his answer that the one whose name appears was not his agent.

The dispatch which follows from Mr. Blackburn without date, was not an acceptance of the request contained in the first, to give a refusal, but an offer to sell, and is addressed not to C. E Jameson & Co., but to Jameson alone. The answer to this, February 18th, is not that he would buy the property, but that he had sold it, with a request that a deed be made to this respondent and sent to Aberdeen bank, that the money was deposited there. The letter of February 21st, is the answer to this. To say that it does not accept this proposition is only to say what the letter itself says. It declines the proposition that he make a deed and send it to Aberdeen, but says to Mr. Jameson: You send me a draft to my bank for $6,000.00 and a deed, and I will execute it. Unless this makes a contract between these parties, B. T. Blackburn and this respondent, there was no contract between them, and certainly when these complainants sent their agent to

Montesano and found that the property was then worth not less than $30,000.00, they were under no moral obligation to sell to Mr. Wooding for three thousand one-half of it, or the whole of it for either three or six thousand. Again, if this is a defense, the burden was upon the defendant to show not only that it was community property, but that the surviving husband whose deed they had obtained, had no right to make it; in other words, it was incumbent upon the defendant to show an outstanding present title to some interest in the property, precisely, as I understand the law, as though they had brought suit against Mr. Blackburn, either upon the contract which they now claim to have had, and which the court says they did have, or upon the covenants in his deed. Clearly, if this is the law, it would not be sufficient to prove that the property was once community property and that the wife had died leaving children as her general heirs. It would be necessary to go a step farther and prove that they were still the owners. Whether they were or were not at the time this action was brought, there is no evidence in the case. None was offered upon our part, because we did not think then and do not now, that there was such a question in the case. We then thought the law to be, and still think it to be, that if defendant by his agents, one or both, obtained the deed in the manner that it is shown by the evidence that he did obtain it, it was totally immaterial whether Mr. Blackburn did or did not own the land described in the deed which they had obtained, he assumed to make title and his covenants were there, or whether Mrs. Blackburn was or was not, as his wife or otherwise, entitled to any interest in it. It was sufficient that the sale was negotiated upon the basis that she was, and the deed obtained by inducing her agent and the agent of her husband to believe that

upon the execution of a quit-claim deed by her agent, the full sum agreed upon, and which the evidence shows certainly did not exceed one-half of the value of the land, should be paid. Whether she owned the land or not, or whether Mr. Blackburn owned it or not, a deed was obtained, I submit, in a manner that ought not to receive the sanction of a court of equity.

With my ideas as to what it takes to make a contract, it would be useless for me to enter upon an extended argument and to produce authorities to prove that this correspondence does not make one. With my ideas as to what courts of law or equity sit for, it would be equally useless and a waste of time to enter upon an argument to prove that either, and especially a court of equity, should not give its approval to what Jameson and Thomas admit that they did, especially when the result would be to enable them or the principal of one or both of them, to get another's property for less than one quarter of its value.

IV.

If this court shall not reverse this cause and remand it to to the circuit court with directions to remand to the state court, but shall entertain jurisdiction and reverse the decree of the circuit court upon its merits, I submit that as a part of the relief to which complainants are entitled, they should recover the amount of the depreciation of the property in value during the time that they have been deprived of its enjoyment, and the power to sell it. It is true that they have brought the three thousand dollars into court, and an return it if this court holds that they should, but things have changed since this action was commenced, and I submit that they should not be required to return the money but should recover damages. The evidence upon this subject begins at page 91 and extends to page 104.

Mr. Dabney: "$50 per acre; could have been sold within the last year and a half or two years (that would be between the time of the commencement of this action and the time of his giving his testimony) for $100.00 an acre.

Mr. Fetterman: "Present value, $40.00; cannot tell what it might have been sold for.

Mr. Stewart: "Present value $50.00; might have been sold for $100.00.

Mr. Wyman: "Present value $35.00; might have been sold for $100.00.

Respondent was called by complainants who testified that he did not think it could, at that time, be sold at $20.00; he said nothing as to its intermediate value.

Mr. Patterson: About $30.00 would have been a fair value at that time.

Mr. Lewis thought its present value $12.00 or $13.00; that it might have been sold for $25.00.

Mr. Maling, who owned the adjoing land, thought that it could have been sold for $125.00.

Mr. Schofield thought its value at the time of the attempted sale about $45.00; its present value $30.00 or $35.00.

Galusha Parsons,
Of Counsel for Appelants.